119-586

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1094.

EDWARD C. HANCOCK, APPELLANT,

vs.

MRS. ELIZA JANE HOLBROOK, GEORGE NICHOLSON, R. W. HOLBROOK AND RICHARD FITZGERALD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 9, 1886.

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a *Transcript of Appeal.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

EDWARD C. HANCOCK, Appellant,
vs.
MRS. ELIZA JANE HOLBROOK *et als.*, Appellees. } No. 11215.

Appearances: Rouse & Grant for appellants; T. J. Semmes & Robert Mott for appellees.

Appeal returnable to the Supreme Court of the United States, at Washington, D. C., on the 1st Monday of July, A. D. 1886.

1 *Petition. Filed Nov. 25th, 1876.*

STATE OF LOUISIANA, *Parish of Orleans:*

Third District Court. No. 23653.

To the honorable the judges of the superior district court, parish of Orleans:

The petition of Edward C. Hancock, a resident of this city and a citizen of Louisiana, respectfully represents:

1. That on the 19th day of December, 1873, there was created and organized in the city of New Orleans, under the statutes thereunto providing, a private corporation, by an act before R. C. Mott, notary, which was styled and designated as the New Orleans Picayune Printing Company; that the objects and purposes of said company were declared to be and were to print and publish a daily newspaper in the city of New Orleans, and to carry on a general print-
2 ing establishment in connection therewith, all of which will appear from a duly certified copy of said charter hereunto annexed and made part of this petition.

2. Petitioner further shows that at the time there existed in the city of New Orleans a body corporate in law styled the Herald Printing Company, which said company was then engaged in the publication of a newspaper in the city of New Orleans, which was known and styled as the "New Orleans Herald."

3. Petitioner further shows that prior to the 19th day of December, 1873, the said New Orleans Picayune newspaper and printing establishment, which had for many years previous existed in this city, was conducted and managed by a company styled the Picayune Printing and Publishing Company, which company, however, was then in an embarrassed and bankrupt condition.

4. Petitioner shows that prior to the 19th day of December, 1873, the said New Orleans Picayune newspaper and printing estab-
3 lishment was sold at sheriff's sale at the suit of John Phelps *vs.* The Picayune Printing and Publishing Company, No. — of the docket of the sixth district court for the parish of Orleans, on a

credit of twelve months, to the Herald Printing Company aforesaid, which said Herald Company gave bond according to law for the sum of twenty thousand dollars, the purchase price, and that Joseph Hernandez, a resident of this city, became surety on said bond.

5. Petitioner shows that thereupon the Herald Printing Company entered into possession of said New Orleans Picayune newspaper establishment, and proceed- to conduct and administer the same with success.

While in the possession and ownership of said property, however, propositions were made to the officers and directors of said company by Henry C. Warmoth, a resident of this city, in behalf of Alva M. Holbrook, deceased, late of the city of New Orleans, and *in behalf of Alva M. Holbrook, deceased, late of the city of New Orleans, and*

4 in behalf also of Joseph Hernandez aforesaid and of said Warmoth himself, who was liable in some manner to or for said Hernandez on account of his (Hernandez'-) suretyship on said twelve months' bond.

Petitioner further shows that propositions were — to the effect that a sale or transfer of said Picayune establishment should be made by said Herald Company to said A. M. Holbrook in consideration of the assumption by him (the said Holbrook) of the payment of said twelve months' bond, in lieu of said Herald Company, and of his deposit with said Hernandez of satisfactory security, to be applied to such payment.

6. Petitioner further shows that it was further proposed by said Warmoth in behalf of said Hernandez and of the said Holbrook and of himself (the said Warmoth) that, as part of the said proposed transaction, a new body corporate should be created, to be styled the Picayune Printing Company, to which new company the said Holbrook should transfer and deliver in full ownership the said

5 New Orleans Picayune printing and newspaper establishment, to be received by him, the said Holbrook, from said Herald Printing Company, as proposed.

7. Petitioner now shows that the said proposition so made to the officers and directors of the Herald Company as aforesaid *were* accepted, and the New Orleans Picayune Printing Company was so constituted and formed, as hereinbefore set forth.

Petitioner shows that it was provided in the act of charter that the capital stock of said new company should consist of one hundred and twenty shares of the nominal par value of two hundred and fifty dollars, all to be considered as full-paid stock, and that the said Holbrook, in consideration of the assumption by him, as aforesaid, of the liability of said Herald Company, as principals on said twelve months' bond and the deposit by him with the said Hernandez, as surety on said bond, of securities to his satisfaction for the payment of said bond, and the transfer by him (the said Holbrook) to said new company of said newspaper establishment, should be the

owner of sixty-five shares of said full-paid stock, and that the

6 stockholders of said Herald Company, as consideration of entering into such arrangements, in addition *of* being relieved and exonerated from the liability on account of said twelve months'

bond by assumption of the payment thereof by said A. M. Holbrook, were to receive the other fifty-five shares of said full-paid stock, to be distributed among them (*i. e.*, among the stockholders of the Herald Printing Company) in certain proportions, the amount of said fifty-five shares being considered as equivalent for the excess in value of said newspaper establish*ed* over said prices for which it had been purchased of the said Herald Printing Company at sheriff's sale as aforesaid, and a recompense to the then stockholders of the Herald Printing Company for the dissolution of said company and the consolidation of the New Orleans Herald printing establishment with the Picayune printing establishment, and the resulting enhancement of the value of said latter-named printing establishment.

7 All of which said latter transactions will be duly shown on trial hereof by the production of a written agreement made and signed by Alexander Walker, acting for and with the authority of said Herald Company, as president thereof, and by said A. M. Holbrook and Joseph Hernandez and said Henry C. Warmoth.

8. Petitioner now further shows that by reason of the said transaction the said New Orleans Picayune Printing Company became and was in no way liable for or on account of said twelve months' bond which, as aforesaid, was given by said Herald Company for the price of adjudication to it at sheriff's sale of said newspaper establishment; that said bond in no sense ever became a debt of said New Orleans Picayune Printing Company, but remained the debt of the said Herald Company and the personal debt, by his assumption thereof as aforesaid, of the said A. M. Holbrook and of said Hernandez, as surety, and of said Warmoth to whatever extent or in whatever manner he was bound therefore to, with, or for said Hernandez.

8 9. Petitioner further shows that by the terms of said charter of the New Orleans Picayune Printing Company petitioner, by reason of his having been a stockholder in the Herald Printing Company aforesaid, became a stockholder in the said new company, and was recognized in the said charter as the holder and owner of fifteen shares of the one hundred and twenty shares of the capital stock of said company.

10. Petitioner shows that he has since become the holder and owner of five additional shares of said capital stock, one of which said five shares originally stood in the name of Albert Shultz, one in the name of Wm. Mehle, one in the name of Christian Mehle, one in the name of Joseph Donaldson, and *of* in the name of D. B. Penn; all of which will be duly shown on the trial thereof.

11. Petitioner shows that the original par value of said capital stock of said company was fixed at two hundred and fifty dollars per share, as aforesaid, but that said shares are now worth, by reason of the enhancement of the said property, fully twelve hundred dollars per share.

9 12. Petitioner further shows that the directors named in the charter of the said New Orleans Picayune Printing Com-

pany proceeded to administer the property and affairs of said company, and that A. M. Holbrook was chosen president of said company, and that the business of said company prospered and large assets accumulated, and the revenues of the establishment were amply sufficient, if properly administered, to pay all its expenses, to meet all its debts justly due, and to return a dividend to its stockholders.

13. Petitioner shows that the number of directors so constituted was composed of the said late A. M. Holbrook, president of said company, of Peter St. Armand, Richard W. Holbrook, Alexander Walker, and petitioner. The said St. Armand and the said Richard W. Holbrook, however, petitioner avers, were not *bona fide* stockholders in said company and had no actual interest therein, they being only employees of the said A. M. Holbrook, who had placed a share of said stock in the name of each, and to the name only, that he should be able to select them as directors upon said
10 board through the prepondering influence of his ownership of the majority of the stock of said company, and with a view, as this petitioner avers and charges, of perpetrating a fraud and a wrong upon this petitioner and the other stockholders in the said company.

14. And petitioner now further shows that the said A. M. Holbrook, president of said company, confederating and combining with the said Peter St. Armand and the said R. W. Holbrook, proceeded to administer the said property and its earnings with the view to unlawfully and fraudulently and wrongfully converting the property of said corporation, including the entire property of the New Orleans Picayune newspaper and printing establishment, to the satisfaction and payment of the personal indebtedness of said A. M. Holbrook, president of said company, and to thereafter transfer to him and vest in him, the said A. M. Holbrook, in his private and individual capacity, the title and ownership of the said New Orleans Picayune newspaper and printing establishment, in disregard
11 of the rights of this petitioner and of the other stockholders of said company.

15. Petitioner further shows that in furtherance and execution of said fraudulent scheme the said A. M. Holbrook, president of said company, convened a meeting of said board of directors on the 14th of December, 1874, and then and there caused to be introduced and passed the following resolution:

"Whereas the twelve months' bond for the original purchase of the New Orleans Picayune — and printing establishment given to the sheriff in the suit of John Phelps *vs.* The New Orleans Picayune — and Publishing Co., No. —, sixth district court, amounting to twenty thousand two hundred and eleven dollars and thirty-eight cents, is about to become due and payable; and

"Whereas A. M. Holbrook is unable to pay the same; and

"Whereas this company has not the means to satisfy said bond; therefore be it

"Resolved, That in case Joseph Hernandez, the surety on
12 said bond, shall pay the same the president of the company

be, and he is, authorized to sell and transfer the Picayune establishment and all its property and good will to the said Joseph Hernandez in satisfaction of his claim as surety on his bond."

16. Petitioner shows that there was present at said meeting of said board of directors the said A. M. Holbrook, the said R. W. Holbrook, the said Peter St. Armand, and the said Alexander Walker, and this defendant was absent, and that said Alexander Walker protested against said resolution as illegal and a fraud upon the stockholders; that the bond was not due by said company, but by said Holbrook personally, and that the attempt to convey said property to said Hernandez was a fraud, and that said Alexander Walker caused his protest to be entered upon the minutes of the company, but that, nevertheless, the unlawful resolution was adopted by the votes of A. M. Holbrook; of his brother, the said R. W. Holbrook, and the said Peter St. Armand, who were completely under the control of said A. M. Holbrook.

13 17. Petitioner further shows that, although one of the directors of the said New Orleans Picayune Printing Company, as aforesaid, yet from the first organization of the said board of directors petitioner was to all intents and purposes excluded from any participation in the management of said concern by the said A. M. Holbrook combining with his two said confederates upon said board; and petitioner avers, discerning, as he then believed and as he now believes correctly, the fraudulent purposes of said A. M. Holbrook confederating with his two accomplices, as aforesaid, to consum-ate his illegal and fraudulent designs, petitioner protested, and has at all times continued to protest, against said fraudulent transactions.

18. Petitioner now further shows that on the day following, on the 15th day of December, the said A. M. Holbrook announced himself in possession of the said newspaper establishment as the agent of Joseph Hernandez, although at that time the twelve months' bond given by said Herald Printing Company, with said Hernandez as surety, had not become due, and although at that time the

14 said New Orleans Picayune Printing Company had in no way became liable for or on account of said bond, to satisfy which and to screen the said A. M. Holbrook from the payment thereof as his personal debt the entire property of the New Orleans Picayune Printing Company was thus fraudulently converted and misapplied as aforesaid.

19. Petitioner now still further shows that as a further step in the said fraudulent transaction the said A. M. Holbrook, the president of said company, as aforesaid, on the 18th day of December, 1874, convened an illegal and pretended meeting of the stockholders of said company, at which meeting, by a vote of persons not entitled therein, it was declared that the Picayune Company was dissolved, and that R. W. Holbrook aforesaid, brother of said A. M. Holbrook, and George Nicholson, an accomplice of said A. M. Holbrook, were appointed as commissioners to liquidate its affairs, and that the said meeting was controlled and all its acts directed by said A. M. Holbrook, who had already transferred the whole property

of said company fraudulently and illegally to said Joseph
15 Hernandez.

Petitioner denies that the said meeting of stockholders was in anywise binding upon him as a stockholder, or upon any stockholder in said company.

20. And now petitioner shows that immediately after said pretended dissolution [of] said corporation and the appointment of said so-called commissioners to liquidate its affairs the said Joseph Hernandez transferred the said Picayune newspaper establishment to A. M. Holbrook for the stated consideration of twenty thousand two hundred and twenty dollars, to be paid in monthly instalments from the earnings of the establishment, which establishment and its earnings had never ceased to be the rightful property of said Picayune Printing Company and its stockholders, and the said A. M. Holbrook continued in possession of said establishment under claim of sole ownership, as above set forth, up to the time of his death, which occurred about —, and that Mrs. Eliza Jane Holbrook, his widow, a resident of this city, soon after assumed to be in possession of said establishment, and asserted title thereto
16 as the universal legatee of the said A. M. Holbrook.

21. And petitioner further avers that he is informed that George Nicholson aforesaid now also claims some right, title, and interest in the said establishment by virtue of some transaction or transfer between Mrs. Eliza Jane Holbrook, widow, and him, the said George Nicholson, the manner of which transaction petitioner is not informed; but true it is that the said newspaper establishment and all the property appertaining thereto is in the possession of the said Mrs. Eliza Jane Holbrook and the said George Nicholson, although, as this petitioner avers, the said establishment has never ceased to be and is now the property of the stockholders of the New Orleans Picayune Printing Company.

22. Petitioner further avers that the said A. M. Holbrook originally came into control and possession of said property in a fiduciary capacity and was entitled to hold the same only in trust for the benefit and advantage of said corporation of which he was president, and that the transfer of said property, as hereinbefore set forth,
17 to said Hernandez and from him to said A. M. Holbrook, in his individual capacity, were made with full knowledge of said trust on the part of said Hernandez and said A. M. Holbrook, and with full knowledge on the part of all of them that the said newspaper establishment was the property of the corporate body known as the New Orleans Picayune Printing Company, and the said company was not liable on said twelve months' bond given by said Herald Company, and that said A. M. Holbrook was liable therefor personally by reason of his assumption in the manner hereinbefore set forth, and that the directors of the said Picayune Printing Company could convey no title whatever to the property of said corporation to any one knowingly receiving it in satisfaction of the debt for which said corporation was in nowise bound.

23. Petitioner now declares and avers that at the time of the said pretended meeting of the stockholders, at the time the pretended

resolution to dissolve said corporation is pretended to have
18 been adopted, said A. M. Holbrook was not a stockholder with authority in law to appear and vote at a meeting of stockholders of the corporation, for this: that the said A. M. Holbrook, who had assumed the payment of said twelve months' bond, in consideration of his receiving sixty-five shares of the capital stock of the said company, had defaulted on said obligation, and thereby the said sixty-five shares of stock so issued to him in consideration of his assumption of said bond were forfeited to and reverted to the said company and became the property of the stockholders thereof: but for this petitioner avers and admits that in equity and good conscience, and notwithstanding the fraudulent and illegal combinations and transactions of said A. M. Holbrook with Joseph Hernandez and George Nicholson and Peter St. Armand and R. W. Holbrook, nevertheless the said New Orleans Picayune Printing Company and the holders and owners of the remaining fifty-one shares of the stock thereof owed to the said Joseph Hernandez or his legal assigns the amount in money which said Joseph Her-
19 nandez paid for the discharge of the twelve months' bond aforesaid, upon which said Hernandez was surety as aforesaid, but which was primarily the debt in equity and good conscience of the New Orleans Picayune Printing Company, as successors of the Herald Company, which corporation was legally the principal on said bond; but petitioner shows that from such amount so due from the stockholders aforesaid to Joseph Hernandez or his assigns aforesaid should be deducted any amount which may have been paid to the said Hernandez or his assigns under the illegal and fraudulent pretended transfer contracted between said Holbrook and said Hernandez, whereby the said Hernandez assumed to transfer the said printing establishment to Holbrook in consideration of the sum of twenty thousand two hundred and twenty dollars.

24. Petitioner shows that four shares of the original one hundred and twenty shares of the capital stock of said company — by the said McComb, and became the property of the remaining shareholders, as will be shown on trial.

20 25. Petitioner further avers that by reason of the surrender of the said four shares by the said McComb, and of the reversion to the company of the sixty-five shares issued to A. M. Holbrook as aforesaid, there now remains but fifty-one shares of the capital stock of the said company, — petitioner is holder and owner of twenty shares as aforesaid.

26. Petitioner now further avers and shows that by reason of the fraudulent machinations and transactions of the said A. M. Holbrook and his said confederates, hereinbefore set forth, the New Orleans Picayune Printing Company has been disorganized, and there now remains no proper officer or corporate authority to assert its rights in a court of justice or sue for and recover its property or to have care and custody thereof, the president and the majority of the board of directors alike having proved recreant to their trust and confederated and combined among themselves and with others, as herein-

before set forth, to defraud the corporation and all of its stockholders other than themselves.

21 27. And petitioner shows that he has no adequate remedy at law to redress his wrongs and recover his rights, except by instituting and maintaining this action as a stockholder of the said corporation.

28. Petitioner further shows that Charles T. Howard, a resident of the city of New Orleans, is the sole assignee of all the right and title in and to the New Orleans Picayune printing establishment of Joseph Hernandez under and by virtue of the transaction hereinbefore set forth.

29. Petitioner further shows and avers that the New Orleans Picayune newspaper and printing establishment, which was the sole property of the New Orleans Printing Company, never became the individual property of A. M. Holbrook, and could not pass into his possession, but that said property and all of its appurtenances at No. 66 Camp street, New Orleans, is now in the individual possession of said Eliza Jane Holbrook and said George Nicholson under

22 some pretended transfer from her, and that said Mrs. Holbrook claims to have become the owner of said property by testamentary bequest from said A. M. Holbrook, but that he could bequeath to her no better title than he had himself, and that he was without a shadow of a title of any validity in law to warrant the withholding of said property from its rightful owners, the said corporation and its stockholders.

30. Petitioner still further shows that said A. M. Holbrook and the said George Nicholson and the said R. W. Holbrook and the said Mrs. Eliza Jane Holbrook were without any power, in law or equity, to incumber the said property known as the New Orleans Picayune newspaper and printing establishment with any debt, liability, or obligation; and petitioner avers that said property is not now charged with any debt, liability, or obligation, and that the remaining fifty-one shareholders of the capital stock of the New Orleans Picayune are without any standing liabilities or obligations as stockholders in said company, except the obligation and good

23 conscience to pay any balance that may be due to Charles T. Howard, as aforesaid, as the assign of Joseph Hernandez, as surety on said twelve months' bond, as aforesaid.

31. Petitioner reserves his right to maintain an action for the recovery from Mrs. Eliza Jane Holbrook and George Nicholson, and from the succession of the late A. M. Holbrook, the proportion of mean profits and dividends which should have accrued to him *pro rata* as a stockholder in the New Orleans Printing Company, as hereinbefore set forth.

32. Petitioner further avers that he is informed that Charles T. Howard, as the assignee of Joseph Hernandez as aforesaid, claims to have some lien or privilege upon said newspaper establishment, and claims to be in possession and control of the same through an agent who is situated in said building; but petitioner avers that said Howard has no valid right, title, or claim to the said property, or to the possession or control thereof, beyond the right to recover from the re-

maining shareholders any amount that may yet be due him
24 as the assign of Joseph Hernandez for any balance unpaid of the amount paid the said Hernandez as surety upon said twelve months' bond as aforesaid.

33. Petitioner further avers that, the premises considered, it appears to be necessary, and the law would seem to warrant and require this hon. court, [to] appoint some suitable person as receiver to take hold and administer said property for the advantage and benefit of the remaining stockholders of the New Orleans Picayune Printing Company until the further orders of this honorable court.

34. Petitioner further avers that it is necessary, in order to protect petitioner in his rights pending the trial of this suit, that writs of injunction should issue against Mrs. Eliza Jane Holbrook, George Nicholson and Charles T. Howard, enjoining and restraining them and their agents and employees from removing any of the property belonging to the New Orleans Picayune newspaper and printing establishment from the building at No. 66 Camp street, or from alienating or disposing of any of said assets or property, or
25 from contracting any debts in the name of said establishment or otherwise incumbering said property until the further orders of this hon. court.

35. And petitioner further reserves the right to apply for such writs and orders as may be necessary and proper to protect the receiver to be appointed.

36. Wherefore, the premises considered, petitioner prays that Mrs. Eliza Jane Holbrook, George Nicholson, R. W. Holbrook, and Charles T. Howard, all of this city, may be cited to appear and answer the demand of this petition.

37. Petitioner prays that the said Mrs. Eliza Jane Holbrook and the said George Nicholson and the said Charles T. Howard may be cited in their individual capacity, and that the said R. W. Holbrook and the said George Nicholson may be so cited and notified as so-called commissioners pretended to have been appointed to liquidate the affairs of the New Orleans Picayune Printing Company at the illegal and pretended meeting of the stockholders of the said company held on or about the 18th of December, 1874.

26 38. Petitioner prays that, after all due and legal proceedings had, judgment may be rendered in his favor and against said Mrs. Eliza Jane Holbrook, and the said George Nicholson, and the said Charles T. Howard, individually, and against said George Nicholson and the said R. W. Holbrook, pretended commissioners as aforesaid, decreeing him (petitioner) to be the owner of twenty fifty-firsts ($\frac{20}{51}$) of all the property, rights, assets, good will, and stock on hand of the newspaper and printing establishment situated at No. 66 Camp street, New Orleans, and known as the Picayune newspaper and printing establishment, which said establishment is now held by and in the possession of said Eliza Jane Holbrook, and the said George Nicholson, and the said Charles T. Howard, and subject upon the part of petitioner in law to his *pro rata* liability to the said Charles T. Howard for the payment to him of any balance that may be due to him as the assign of Joseph

Hernandez for the amount paid by the said Joseph Hernandez for the discharge of the twelve months' bond, upon which
27 said Hernandez was surety, as particularly hereinbefore set forth.

39. Considering the annexed affidavit and upon proper bonds given, petitioner prays that writs of injunction may issue directed to the defendants, Mrs. Eliza Jane Holbrook, George Nicholson, and Charles T. Howard, enjoining and restraining them and each of them, and each of their agents and employees, in the name of and until the further orders of this hon. court, from removing any of the property belonging to the New Orleans Picayune newspaper and printing establishment from the building at No. 66 Camp street, and from alienating or disposing of any of said property, and from contracting any debts in the name of said establishment or otherwise incumbering said property.

40. Petitioner further prays that your honor will appoint some suitable person as receiver to take possession of the property hereinbefore described, situated at No. 66 Camp street, New Orleans, and consisting of the printing establishment known as the New
28 Orleans Picayune newspaper and printing establishment, now in the possession of the said defendants, Mrs. Eliza Jane Holbrook and George Nicholson and Charles T. Howard.

41. And petitioner further prays that said receiver may be directed by this hon. court to administer the said property for the benefit of petitioner and of the other stockholders of the New Orleans Picayune Printing Company until the further orders of this hon. court.

42. Petitioner prays that the said receiver, so to be appointed, may be directed to cause an inventory of the said property to be made.

Petitioner prays for costs, and for all such further and general relief as the exigencies of the case may demand and the law warrant.

(Signed) HENRY C. DIBBE,
Attorney for Petitioner.

STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

Edward C. Hancock, being duly sworn, deposes and says that the averments in the above and foregoing petition contained are true and correct, to the best of his knowledge and belief, so help
29 him God, and that writs of injunction *is* necessary to protect him in his rights.

(Signed) EDW. C. HANCOCK.

Sworn to and subscribed before me this 25th Nov'r, 1876.

(Signed) WM. H. HOLMES,
Second Justice of the Peace, Parish of Orleans.

Order.

Let the defendants be notified to show cause on Friday, Dec'r 1st, 1876, at 11 o'clock a. m., why writs of injunction should not be

granted as within prayed for, and why a receiver should not be appointed as prayed for.

New Orleans, November 25th, 1876.

(Signed) B. L. LYNCH, *Judge.*

Act of Incorporation Annexed to Petition.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that on this nineteenth day of December, eighteen hundred and seventy three, before me, Robert C. Mott, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared
the several parties whose names are hereto subscribed, who
30 declared that they have covenanted and agreed, and by these
presents do covenant and agree and bind themselves and those whom they represent, to establish and incorporated company for the object and purposes and under the obligations, stipulations, and regulations hereinafter set forth and contained, to wit:

Art. 1st. The name and style of this corporation shall be The New Orleans Picayune Printing Company. Its domicile shall be the city of New Orleans. It shall have a corporate seal with a device of a cotton-bale. All legal processes shall be served on the president. It shall exist for twenty years from the date hereof, unless sooner dissolved as required by law.

Art. 2nd. The object of this corporation is to print and publish a newspaper or newspapers and to carry on a printing and publishing business of every kind.

Art. 3d. The capital stock of this corporation shall be one hundred and twenty shares of stock of two hundred and fifty dollars each, making thirty thousand dollars.

Art. 4th. This corporation shall be governed by a board of
directors of five persons, who must be stockholders and own
31 at least one share of its capital stock. The board of directors
is hereby declared to be composed of Alva M. Holbrook, Peter St. Armand, and R. W. Holbrook, Alexander Walker, and E. C. Hancock, who shall serve until the first regular election and until their successors are duly elected.

Art. 5. An election of directors shall be held on the first Monday of December of each year at the office of the company, at which election every shareholder shall be entitled to one vote, and the directors shall hold their office for one year, or until their successors are duly elected. A failure to elect directors on the day named shall not dissolve this corporation, but the directors in office shall hold over until an election shall take place, and, in case of a failure to elect on the day indicated, a meeting for holding an election can be called by any three stockholders, after ten days' notice, for the purpose of electing directors.

Art. 6. The board of directors shall adopt such by-laws as may be necessary to manage the company, and appoint such officers and clerks as may be required.

Art. 7. Dividends of the profits arising from the business
32 shall be declared at such time as the board of directors may deem advisable.

Art. 8. The stock shall be transferred only on the books of the corporation.

Art. 9. The liquidation of the affairs of this corporation shall be by a commissioner, to be appointed by a vote of the majority in amount of the stockholders, either at a regular or special meeting.

Art. 10. The Picayune newspaper establishment, recently purchased at sheriff's sale by the said Herald Company, and which has been by said company transferred and sold to A. M. Holbrook, is, by said A. M. Holbrook, now sold, delivered, and transferred to this corporation at the price and sum of thirty thousand dollars cash, which said Holbrook acknowledges to have received, and the said establishment, as required at said sheriff's sale, is the property of this corporation, and the share- of stock in this corporation are fixed at one hundred and twenty of two hundred and fifty dollars each, making an aggregate of thirty thousand dollars, and all said shares are full paid and are distributed among the subscribers in the following proportions:

	Shares.
A. M. Holbrook	Sixty-three.
Peter St. Armand	One.
R. W. Holbrook	One.
33 E. C. Hancock	Six.
H. L. Swords	One.
F. H. Hatch	One.
Effingham Lawrence	One.
Joseph Hernandez	Eight.
H. S. McComb	Four.
Pinckard & Bickham	One.
W. H. Bell	One.
Wm. Mehle	One.
D. B. Penn	One.
Jno. T. Sinnott	One.
David Bidwell	Two.
Cyrus Bussey	One.
Albert Shultz	One.
Lovell & Bailey	One.
Jos. Donaldson	One.
Chris. Mehle	One.
W. P. Harper	One.
Thos. Barnes	Two.
E. C. Hancock	Nine.
Alex. Walker	Ten.

Thus done and passed at this city of New Orleans, on the day [and] month first herein written, in the presence of Thomas J. Semmes and Robert Mott, competent witnesses, hereto required, who have

hereunto set their hands with the said parties and me, notary,
34 after reading the whole.

(Signed)	A. M. HOLBROOK,	Sixty-three	shares.
"	ALEXANDER WALKER,	Ten	"
"	J. HERNANDEZ,	Eight	"
"	R. W. HOLBROOK,	One	"
"	E. C. HANCOCK,	Fifteen	"
"	PETER ST. ARMAND,	One	"

Witnesses:
(Signed) THOS. J. SEMMES.
" ROBERT MOTT.
" R. C. MOTT,
Not. Pub.

I have examined the within and foregoing act of corporation and am of the opinion that the object and purposes thereof are legal, and that none of the provisions therein contained are contrary to law; wherefore I approve the same.

N. O., Dec. 20th, 1873.

(Signed) JOHN McPHELIN,
District Attorney for the First Judicial District.

Petition to *Removal to U. S. Court.* *Filed Dec'r* 13, 1876.

35 To the hon. the superior district court for the parish of Orleans:

The petition of George Nicholson, with respect, represents—

That he is a citizen of the United States and a citizen of the State of Mississippi.

That he is a party defendant in the suit of E. C. Hancock *vs.* E. J. Holbrook *et als.*, No. 27661 on the — of this hon. court.

That said suit is now pending in this court, and the matter in dispute therein exceeds, exclusive of all costs, the sum and value of five hundred dollars.

That the plaintiff in said suit is E. C. Hancock, who is a citizen of the State of Louisiana, and that this is the first term at which said cause could be first tried, and no trial thereof has been had.

That petitioner desires to remove said cause or suit from this hon. court into the circuit court of the United States for the fifth circuit and district of Louisiana, to be held in the district of Louisiana, at New Orleans; that for this purpose, and in compliance with
36 the act of Congress in such case made and provided, petitioner has prepared and filed herewith his bond, with good and sufficient security, for his entering in said circuit court on the first day of its next session a copy of the record of said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore petitioner prays that the said suit of E. C. Hancock *vs.* E. J. Holbrook and another be removed into the circuit court of the United States for the fifth circuit and district of Louisiana, holding

sessions at New Orleans according to law; that this hon. court proceed no further therein.

(Signed) SEMMES & MOTT,
Att'ys for Pet'r.

(Signed) GEO. NICHOLSON.

Supplemental & Amended Petition. Filed Dec'r 19, 1876.

Superior D. C.

E. G. HANCOCK
vs.
Mrs. E. J. HOLBROOK. } No. 27661.

37 The amended and supplemental petition of plaintiff respectfully shows:

That there was an error in the original petition herein filed in the statement that George Nicholson and R. W. Holbrook were the pretended commission pretended to have been appointed at the pretended meeting of stockholders referred to in the petition as having been held Dec. 22, 1873.

Petitioner now avers that in truth, as petitioner has learned, the said R. W. Holbrook and Richard Fitzgerald, a resident of this city and a citizen of this State, were the persons so pretended to have been appointed, instead of the said R. W. Holbrook and George Nicholson, as alleged in plaintiff's original petition, the said George Nicholson being also a party defendant hereto in his individual capacity.

Wherefore plaintiff prays that he may be permitted to file this amended and supplemental —, and that Richard Fitzgerald, a resident of this city, may be made a party to this suit, and that he may be cited and served with a copy of the original petition herein
38 filed and their amended and supplemental petition. Plaintiff prays for general relief.

(Signed) H. C. DIBBLE,
Att'y for Pl'ff.

Order.

Let this amended and supplemental petition be filed and service made as prayed for.

N. O., Dec'r 19, 1876.
(Signed) B. L. LYNCH, *Judge.*

Order Remanding Case. Filed March 20th, 1885.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. November Term, 1884.

EDWARD C. HANCOCK
vs.
ELIZA JANE HOLBROOK *et als.* } No. 8320.

NEW ORLEANS, WEDNESDAY, *March 4th*, 1885.

Court met pursuant to adjournment. Present: Hon. Edward C. Billings, district judge.

39 An appeal having been taken in this cause to the Supreme Court of the United States the mandate of said Court was this day filed, and on motion of Rouse & Grant, solicitors for complainant, it was ordered that the same be recorded, and it is as follows, viz:

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-four, the said cause came on to be heard before the said Court on the said transcript of record, and was argued by counsel; On consideration whereof it is now here ordered, adjudged, and decreed by this Court, that the decree of the said circuit court in this cause be, and the same is hereby, reversed, each party paying one-half of the costs of this court.

And it is further ordered [that] this cause be, and the same is hereby, remanded to the said circuit court, with directions to remand it to the State court from which it was improperly removed and with liberty to make such order as to costs accruing in the circuit court after the removal as equity and justice may require.

17th November, 1884.

40 And thereupon it was ordered that this cause be, and the same is hereby, remanded to the State court whence removed; and the court considering that the complainant and the defendants assented to the cause remaining in this court, it is further ordered that the costs in this court accrued after such removal be divided, each party paying one-half thereof, and that execution may issue therefor.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this 17th day of March, A. D. 1885.

[L. S.] (Signed) E. R. HUNT, *Clerk.*

Supplemental and Amended Petition. Filed April 9th, 1885.

Civil D't Court. Div. A.

EDWARD C. HANCOCK
vs.
Mrs. E. J. HOLBROOK *et als.* } No. 13820.

41 To the honorable the judges of said court:

The supplemental and amended petition of Edward C. Hancock, filed by leave of court, with respect shows:

That said R. W. Holbrook and Richard Fitzgerald did not, nor did either of them, qualify or assume to act as liquidators of said New Orleans Picayune Printing Company, and are without interest in the premises.

And petitioner further shows that said A. M. Holbrook retained the possession of said Picayune newspaper and printing establishment, consisting of the engines, printing-presses, type, material, and other property then in the building No. 66 Camp street, in this city, including the name and good will of said newspaper, its books, accounts, subscription lists, and advertising patronage, the whole being worth $100,000 (the property of said New Orleans Picayune Printing Company), from the time he so as aforesaid wrongfully acquired the same until his death, on or about the 3d day of January, 1876; and thereupon the defendant, Mrs. Eliza Jane Holbrook, took possession thereof, as instituted heir, and ever since then
42 hath retained, and still retains, possession thereof, except such interest therein as she has transferred to the defendant, George Nicholson, who held and still holds the same.

And petitioner further avers that the said A. M. Holbrook, and after his death the defendants, Mrs. Holbrook and George Nicholson, conducted and carried on the business of said Picayune newspaper and printing establishment, and made large profits therein and therewith, and that your petitioner is entitled to any account thereof and to be paid his *pro rata* share of the same according to his interest aforesaid in said New Orleans Picayune Printing Company.

And petitioner avers that the possesson of said A. M. Holbrook of the property aforesaid was that of a trustee, and the said Mrs. Holbrook and George Nicholson took possession thereof with full knowledge of its trust, character, and of all the facts above alleged as well as those set forth in the original petition herein.

And petitioner further amends his original petition herein
43 by striking out all that portion of paragraph numbered 23 following the words "holders thereof" and commencing with the words "but for this," in line 18, p. 7, of the certified copy of said petition now on file herein; also by striking out all of paragraphs 28, 30, 31, & 32 of said petition.

And petitioner avers that said defendants refuse to surrender said property, as well as to account for the profits derived from its use.

Wherefore petitioner prays that Mrs. Eliza Jane Holbrook, George Nicholson, Charles T. Howard, R. W. Holbrook, and Richard Fitz-

gerald be cited to answer petitioner's demand herein, and that after due proceedings it be adjudged and decreed that the New Orleans Picayune newspaper and printing establishment and property aforesaid was and is the property of the lawful stockholders of the New Orleans Picayune Printing Company; that the possession and control thereof by A. M. Holbrook, Mrs. E. J. Holbrook, and George Nicholson was and is wrongful; that said A. M. Holbrook's possession thereof was that of trustee, and that
44 said Mrs. Holbrook and George Nicholson took possession thereof with full knowledge of its trust character; that an account be taken of the earnings and profits derived and made therefrom and therewith since the 15th day of December, 1874; that said defendants, Mrs. Holbrook and George Nicholson, be decreed to pay your petitioner, as owner of twenty shares of the capital stock of said New Orleans Picayune Printing Company, his *pro rata* share of said earnings and profits, with legal interest thereon from the time the same accrued until paid; that petitioner be decreed to be the owner of ($\frac{20}{51}$) twenty fifty-first parts of said New Orleans Picayune and printing establishment and property aforesaid, and that the defendants be enjoined from disposing of the same; that some discreet person be appointed receiver thereof, to take possession and administer the same subject to the orders of this hon. court during the pendency of this suit, and that said R. W. Holbrook and Richard Fitzgerald be enjoined and prohibited from
45 dealing therewith, and that defendants be decreed to pay all costs of suit.

And your petitioner prays for general relief.

(Signed) ROUSE & GRANT,
Att'ys for Pet'r.

Service accepted for Mr. & Mrs. George Nicholson, copy to be furnished.

27th March, 1885.

(Signed) ROBERT MOTT,
Att'y for the Nicholsons, D f'ts—that is, Mrs. E. J. Holbrook that was, & George Nicholson, & for R. W. Holbrook, Rich'd Fitzgerald.

Order.

Let this supplemental and amended petition be filed.

N. O., April 9, '85.

(Signed) A. L. TISSOT, *Judge.*

Exception. Filed April 14th, 1885.

Civil District Court. Div. "A."

EDWARD C. HANCOCK
vs.
Mrs. E. J. HOLBROOK *et als.* } No. 13820.

46 Now come defendants and except to the amended petition of plaintiffs in so far as it changes and strikes out those

portions of the original petition therein mentioned, for the reason that the plaintiff has no right to withdraw admissions beneficial to the defendants.

Wherefore defendants pray that plaintiff's supplemental and amended as well as his original petition be dismissed, and for general relief.

(Signed) THOS. J. SEMMES,
" ROBERT MOTT,
Att'ys for Def'ts, except Howard, Whom They Do Not Represent.

Answer. Filed June 13th, 1885.

C'l D't C't, Div. "A."

E. C. HANCOCK
vs.
Mrs. HOLBROOK *et als.* } No. 13820.

Now come the defendants, Mrs. E. J. Nicholson, George Nicholson, Richard Holbrook, and Richard Fitzgerald, by their
47 undersigned attorneys, and for answer to plaintiff's petition say that they deny generally all the allegations thereof, and they especially and particularly deny each and every allegation thereof charging fraud, collusion, or bad faith.

Wherefore they pray that plaintiff's petition be dismissed and that there be final judgment rendered against him.

(Signed) ROBERT MOTT,
Att'ys of Def'ts.
(Signed) T. J. SEMMES & PAYNE,
For Def'ts.

Amended Answer & Claim in Reconvention. Filed October 21st, 1885.

Div. "A."

E. C. HANCOCK
vs.
Mrs. E. J. HOLBROOK *et al.* } No. 13820.

Now come the defendants, Mrs. E. J. Nicholson, George Nicholson, Richard W. Holbrook, and Richard Fitzgerald, the consent of the court being first obtained, [and] file this their amended and supplemental answer and claim in reconvention against the plain-
48 tiffs to the petition and claim of the plaintiff.

Respondents aver that the claim of the plaintiff, as set forth in his pleadings, is prescribed by the prescription of one year, which respondents plead as a bar to this suit; and respondents further aver that the said suit is oppressive and injurious, and was brought without just cause, and involves the title to the property of two of them, viz., Mrs. E. J. Nicholson and George Nicholson, and depreciates its value, and so long as the plaintiff is permitted to aver and set forth said claim it is an injury to and destructions of the value of the

said property, and the long continuance of the existance of said suit, through the want of action of the plaintiff, has been in itself an injury inflicted on respondents, and respondents have been informed and believe, and they so aver the fact to be, that the plaintiff has the intention to, and, if he be not restrained by the equity powers of this court, he will, institute other proceedings in the United States circuit court for the eastern district of Louisiana, having as
49 their basis the same cause of action, viz., a claim of ownership of the property owned and possessed by the defendants, Mr. & Mrs. George Nicholson, to wit, the Picayune property mentioned in the petition of plaintiff.

That said circuit court is a court of concurrent jurisdiction with this honorable court, and in said court the plea of *lis pendes* could not be maintained, and there would be two suits for the same subject-matter being prosecuted at the same time against respondents, to their disadvantage and injury.

Respondents aver that the plaintiff should be compelled to try and dispose of the present suit now pending in this honorable court, and that the plaintiffs should be enjoined from bringing or prosecuting any other suit for the same cause of action in any other tribunal.

Respondents and plaintiffs in reconvention aver that this suit cannot be removed into the circuit court of the United States for the fifth circuit and eastern district of Louisiana, there being no
50 warrant in law for such a removal, and this court has jurisdiction to prevent a litigation between the parties hereto in another suit in any other tribunal for the same cause of action, and this court has the power and authority to settle all the matters in dispute in said suit as between the parties thereto in relation to the matters set forth in the petition.

It is further averred that these respondents and plaintiffs, in reconvention of those of them in interest, viz., Mr. & Mrs. George Nicholson, are in possession as owners of the property to which the plaintiff sets up claim in his petition, and have been in such possession for many years, and they have a right to call on the plaintiff to set forth and have the judgment of this honorable court on the claim he pretends to have to said property, or his judicial admission that he has none against the property so as aforesaid held and owned by them.

Wherefore respondents and plaintiffs in reconvention pray for permission to file this supplemental and amended answer and
51 claim in reconvention, and in consideration of the premises and of the bond and affidavit annexed an injunction issue restraining the plaintiff, his attorneys, agents, servants, and representatives, from instituting in any other tribunal or court any other suit or suits against these respondents for the enforcement of the claim set up by him in this suit or for the property therein claimed, or the rents, revenues, or profits thereof, and from in any other manner claiming or setting up title or pretending to be the owner of the property as set forth in the petition on file by him in this suit, and that plaintiff's petition be dismissed, his claim in this suit set forth

be rejected, and that there be a final judgment against him and for general relief.

(Signed) ROBERT MOTT,
" THOS. J. SEMMES,
Att'ys of Def'ts & Pl'ffs in Reconvention.

Personally appeared George Nicholson, who, being sworn, says that he is one of parties plaintiffs in reconvention in the fore-
52 going amended and supplemental answer and claim in reconvention, to be filed in the suit No. 13820 on the docket of the civil district court for the parish of Orleans; that the facts and averments therein contained, stated upon information, he believes to be true, and all the other facts and averments therein contained are of his own knowledge and are true to the best of his knowledge and belief.

(Signed) GEO. NICHOLSON.

Sworn to and subscribed before me this 22 day of October, 1885.
[L. s.] (Signed) ANDREW HERO, JR.,
Not. Pub.

Let this supplemental and amended answer and plea in reconvention be filed as prayed for and according to law and let plaintiff be duly cited as herein prayed.
New Orleans, October 21, '85.

—— ——, *Judge.*

53 *Motion to Discontinue. Filed Dec'r 8th, 1885, and Entered on Minutes Same Day.*

C'l D't C't. Div. "A."

EDWARD C. HANCOCK
vs.
Mrs. E. J. HOLBROOK *et al.* } No. 13820.

Upon motion of Rouse & Grant, att'ys for plaintiff, suggesting the death of Charles T. Howard, one of the defendants in this case, and that before his death he ceased to have any interest herein, it is ordered that this suit, as to him (and as to him only), be discontinued.

Petition & Affidavit for Removal. Filed Dec. 8th, 1885.

Div. "A."

EDWARD C. HANCOCK
vs.
Mrs. ELIZA JANE HOLBROOK *et al.* } No. 13820.

To the honorable the judges of said court:

The petition of Edward C. Hancock, plaintiff in the above-
54 named suit, respectfully shows that your petitioner resides in the city and State of New York and is a citizen of said

State; that there is a controversy in said suit between your petitioner and the defendants, Eliza J. Holbrook (wife of George Nicholson), George Nicholson, R. W. Holbrook, and Richard Fitzgerald, all of whom are citizens of the State of Louisiana; that the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars; that your petitioner has reason [to] believe and does believe that from prejudice and local influence he will not be able to obtain justice in said civil district court, and that he desires to remove said suit to the circuit court of the United States for the fifth circuit and eastern district of Louisiana.

Wherefore petitioner prays the acceptance of the surety upon the bond herewith tendered & filed, and that this suit be removed to said circuit court in accordance with the act of Congress in such case made & provided, and further proceedings in this court stayed.

(Signed) ROUSE & GRANT,
Attorneys for Petitioner.

55. STATE OF LOUISIANA, *Parish of Orleans:*

This day personally appeared before me, the undersigned authority, Edward C. Hancock, who, being by me first duly sworn according to law, deposed and said that he is the petitioner in the above and foregoing petition, and that all the facts stated therein are true.

(Signed) EDW. C. HANCOCK.

Subscribed and sworn to before me this 7th day of December, A. D. 1885.

[L. S.] (Signed) P. L. FOURCHY,
Notary Public.

Bond for Removal of Cause. Filed December 8th, 1885.

EDWARD C. HANCOCK
vs.
Mrs. ELIZA J. HOLBROOK *et al.* } No. 13820.

Know all men by these presents that we, Edward C. Hancock, as principal, and John D. Rouse, as surety, are held and firmly bound unto Mrs. Eliza J. Holbrook, wife of George Nicholson; George
56 Nicholson, R. W. Holbrook, and Richard Fitzgerald, their successors, executors, administrators, and assigns, in the sum of five hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated in the city of New Orleans on this eighth day of December, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the above-bounden Edward C. Hancock has this day filed a petition of Edward C. Hancock *vs.* Mrs. Eliza Jane Holbrook & others, No. 13820 of the civil district court for the parish of Orleans, praying for the removal of said suit to the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

Now, the condition of the above obligation is such that if the

above-bound Edward C. Hancock shall enter and file in said circuit court on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in said
57 cause, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) EDW. C. HANCOCK. [L. S.]
" J. D. ROUSE. [L. S.]

Surety accepted.

STATE OF LOUISIANA, *Parish of Orleans:*

Personally appeared before me, the undersigned authority, John D. Rouse, who, being by me duly sworn, said that he is worth the sum of five hundred dollars over and above all debts and liabilities and property exempt from execution, and that he resides in the city of New Orleans.

(Signed) J. D. ROUSE.

Subscribed and sworn to before me the 8th day of December, 1885.

[L. S.] (Signed) P. L. FOURCHY,
Notary Public.

Order.

For reasons orally assigned, and considering that petitioner has not made a proper showing, therefore the order of transfer herein is refused.

New Orleans, December 12th, 1885.

58 (Signed) A. L. TISSOT, *Judge.*

Motion of Defendants to Remand the Cause. Filed January 20th, 1886.

United States Circuit Court, East. Dist. of La.

EDWARD C. HANCOCK
vs } No. 11215.
ELIZA JANE NICHOLSON *et al.*

Proceedings in the United States circuit court, eastern dist. of La.

Now come the defendants and move the court to remand the same to the State court from which it came, on the ground—

1st. That on the face of the papers the case is not removable, because it is not alleged, nor was it true, that the plaintiff was a citizen of New York or of any other State than Louisiana at the time of the institution of the suit.

2d. That the defendants, George Nicholson and his wife, Eliza Jane Nicholson, were citizens of the State of Mississippi at
59 the time the petition for removal was filed in the State court.

George Nicholson, being sworn, says that the facts set forth in the second ground of the within motion are true.

(Signed) GEO. NICHOLSON.

Sworn and subscribed before me this 23 Jan'y, 1886.
(Signed) T. McC. HYMAN,
Dep. Clerk.

George Nicholson, being sworn, deposes and say- that the foregoing plea is not interposed for delay, and is true in point of fact.
(Signed) GEO. NICHOLSON.

Sworn to & subscribed before me this 13th Feb'y, 1886.
(Signed) T. McC. HYMAN,
D'y Clerk.

I certify that the above plea is in my opinion well founded in law.
(Signed) ROBERT MOTT, *Sol.*
(Signed) GEO. NICHOLSON.

Marshal's Return.

Received Jan. 20, 1886, by the U. S. marshal, and on the 21 day of Jan., 1886, I served a true copy of the within
60 motion and order on the law firm of Rouse & Grant, att'ys by handing the same to Mr. Rouse, a member of said firm, in person.
(Signed) R. B. PLEASANTS,
United States Marshal E. D. of La.
" JOHN BAKER,
Dep-ty Marshal.

Replication. Filed January 25, 1886.

United States Circuit Court for the E. District of Louisiana. In Equity.

HANCOCK *vs.* HOLBROOK *et al.*

The replication of Edward C. Hancock, complainant, to the plea of Mrs. Eliza Jane Holbrook, George Nicholson, Richard Fitzgerald, R. W. Holbrook, defendants.

This repliant, reserving unto himself all and all manner of exception to the manifest insufficiencies of the said plea, for replication thereunto say that the averments of said plea are untrue and that the averments of his petition for removal are true, all which matters and things this repliant is and will be ready to aver
61 and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.
(Signed) ROUSE & GRANT,
Solicitors for Complainant.

Judgment.

Extract from judgment-book.

Circuit Court of the United States, Fifth Circuit & Eastern District of Louisiana. November Term, 1885.

NEW ORLEANS, MONDAY, *March* 15, 1886.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

EDWARD C. HANCOCK
vs.
Mrs. ELIZA JANE HOLBROOK *et als.* } No. 11215.

This cause came on to be heard on the motion of the defendants to remand said cause to the State court whence it originated, and was argued by counsel. On consideration whereof it is ordered, adjudged, and decreed that said motion be allowed and
62 accordingly that this cause be remanded to the civil district court for the parish of Orleans, State of Louisiana, whence it originated, and there be proceeded with according to law.

Judgment rendered March 15, 1886.

Judgment signed March 19, 1886.

(Signed) EDWARD C. BILLINGS, *Judge.*

Order Granting Appeal.

Extract from minutes.

EDWARD C. HANCOCK
vs.
Mrs. E. J. HOLBROOK *et al.* } No. 11215.

NEW ORLEANS, *Saturday, June 12th*, 1886.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

Upon motion of Edward C. Hancock, complainant herein, by Rouse & Grant, his solicitors, suggesting that he believes there is error in the final decree herein made the 15th day of March, 1886, remanding this cause to said civil district court for the parish of Orleans, it is ordered that said complainant be, and he is hereby, granted an appeal from said decree to the Supreme Court of
63 the United States, returnable thereto the first Monday of July, 1886, upon said complainant giving bond in the sum of two hundred and fifty dollars, with surety, and conditioned as required by law.

Bond for Appeal. Filed June 12, 1886.

UNITED STATES OF AMERICA:

United States Circuit Court, Eastern District of Louisiana.

EDWARD C. HANCOCK
vs.
Mrs. E. J. HOLBROOK *et als.* } No. 11215.

Know all men by these presents that we, Edward C. Hancock, as principal, and John D. Rouse, as surety, are held and firmly bound, jointly and severally, unto Mrs. Eliza Jane Holbrook, wife of George Nicholson; George Nicholson, R. W. Holbrook, and Richard Fitzgerald in the sum of two hundred & fifty dollars, lawful money of the United States of America, to be paid to the said Mrs. Eliza
64 Jane Holbrook, George Nicholson, R. W. Holbrook, and Richard Fitzgerald, their heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 12th day of June, in the year of our Lord eighteen hundred and eighty-six.

Whereas the said Edward C. Hancock has this 12th day of June, 1886, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 15th day of March, 1886, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of Edward C. Hancock *vs.* Mrs. Eliza Jane Holbrook & others, No. 11215 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden Edward C. Hancock shall prosecute his said appeal to effect, and shall answer all costs if he shall fail to make good
65 his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) EDWARD C. HANCOCK, [L. S.]
By ROUSE & GRANT, [L. S.]
His Solicitors.
(Signed) J. D. ROUSE. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) HENRY J. CARTER.

Bond approved.
(Signed) EDWARD C. BILLINGS, *Judge.*

66 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby

certify that the foregoing 65 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Edward C. Hancock *vs.* Eliza Jane Holbrook *et als.*, No. 11215 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 18 day of September, A. D. 1886.

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 18 day of September, A. D. 1886.

EDWARD C. BILLINGS, *Judge.*

67 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to George Nicholson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of July next, pursuant to a petition and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in the suit wherein Edward C. Hancock is the complainant, appellant, and you, and each of you, are defendants, appellees, to show cause, if any there be, why the decree rendered against the said Edward C. Hancock, as in said petition and order mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12 day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

EDWARD C. BILLINGS, *Judge.*

68 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11215. Edward C. Hancock, appellant, *vs.* Eliza Jane Holbrook *et al.*, appellees. Citation. Marshal's return. Service accepted for appellees. Robert Mott, sol. for appellees. 23rd June, 1886. No. —. U. S. circuit court, eastern district of Louisiana. Filed June 23, 1886. E. R. Hunt, clerk.

69 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Mrs. Eliza Jane Holbrook, wife of George Nicholson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of July next, pursuant to a petition and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in the suit wherein Edward C. Hancock is the complainant, appellant, and you, and each of you, are the defendants, appellees, to show cause, if any there be, why the decree rendered against the said Edward C. Hancock, as in said petition and order mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12 day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

EDWARD C. BILLINGS, *Judge.*

70 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11215. Edward C. Hancock, appellant, *vs.* Eliza Jane Holbrook *et al.*, appellees. Citation. Marshal's return. Service accepted for appellees. Robert Mott, sol. for appellees. 23rd June, 1886. No. —. U. S. circuit court, eastern district of Louisiana. Filed June 23, 1886. E. R. Hunt, clerk.

71 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to R. W. Holbrook, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of July next, pursuant to a petition and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in the suit wherein Edward C. Hancock is the complainant, appellant, and you, and each of you, are defendants, appellees, to show cause, if any there be, why the decree rendered against the said Edward C. Hancock, as in said petition and order mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12 day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

EDWARD C. BILLINGS, *Judge.*

72 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11215. Edward C. Hancock, appellant, *vs.* Eliza Jane Holbrook *et al.*, appellees. Citation. Marshal's return. Service accepted for the appellees. Robert Mott, att'y for sol. 23rd June, 1886. No. —. U. S. circuit court, eastern district of Louisiana. Filed June 23, 1886. E. R. Hunt, clerk.

73 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Richard Fitzgerald, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of July next, pursuant to a petition and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in the suit wherein Edward C. Hancock is the complainant, appellant, and you, and each of you, are defendants, appellees, to show cause, if any there be, why the decree rendered against the said Edward C. Hancock, as in said petition and order mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12 day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

EDWARD C. BILLINGS, *Judge.*

74 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11215. Edward C. Hancock, appellant, *vs.* Eliza Jane Holbrook *et al.*, appellees. Citation. Marshal's return. Service of the within citation accepted. Robert Mott, att'y for appellees. 23rd June, 1886. No. —. U. S. circuit court, eastern district of Louisiana. Filed June 23, 1886. E. R. Hunt, clerk.

Endorsed on cover: E. Louisiana C. C. U. S. No. 1094. Edward C. Hancock, appellant, *vs.* Mrs. Eliza Jane Holbrook, George Nicholson, R. W. Holbrook, & Richard Fitzgerald. Filed October 9, 1886.

SUPREME COURT OF THE UNITED STATES.

No. 1094.

ADDITION TO RECORD.

Supplemental Transcript.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

EDWARD C. HANCOCK
vs.
Mrs. ELIZA JANE HOLBROOK *et als.* } No. 11215.

Exception overruled.

Extract From Minutes. Friday, May 22d, 1886.

Present: The Hon. A. L. Tissot, judge.

EDWARD C. HANCOCK
vs.
ELIZA JANE HOLBROOK. } No. 13820. Div. "A."

The exceptions herein filed by defendant came on for trial this day—present, Rob't Mott, Esqr., for exceptors, and J. D. Rouse, Esqr., for pl'ff—when, after hearing counsel and pleadings, for the reasons orally assigned by the court, it is ordered that said exceptions be maintained in so far only as to dismiss the supplemental and amended petition, and that in other respects the said exceptions be overruled.

U. S. Circuit Court, Eastern District of Louisiana.

CLERK'S OFFICE.

I hereby certify the foregoing to be a true and correct copy from the original record in this office, and that the same was omitted from the transcript to the Supreme Court of the United States heretofore forwarded in the above entitled and numbered cause, the same not being in the memorandum of the record which the plaintiff's counsel requested to be transcribed.

Witness my hand and seal of said court, at the city of New Orleans, this 1st day of December, 1886.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

We consent to the filing of the supplemental transcript as if the same had been returned by the clerk under a writ of certiorari on suggestion of diminution of record, without waiving any right we may have had to the issue of the writ of certiorari or to object to the right of appellant to supplement the transcript at this time, which we now do.

New Orleans, 4th Dec., 1886.

ROB'T MOTT,
Att'y of Appellee.

[Endorsed:] Sup. Court U. S. 1886. Oct'r term. No. 1094. Edward C. Hancock, app't, *vs.* Mrs. Eliza Jane Holbrook. Addition to record.

[Stamped:] Office Supreme Court U. S. Filed Dec. 7, 1886. James H. McKenney, clerk.

10-186

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 1094.

EDWARD C. HANCOCK, APPELLANT,

versus

MRS. ELIZA JANE HOLBROOK ET AL., APPELLEES.

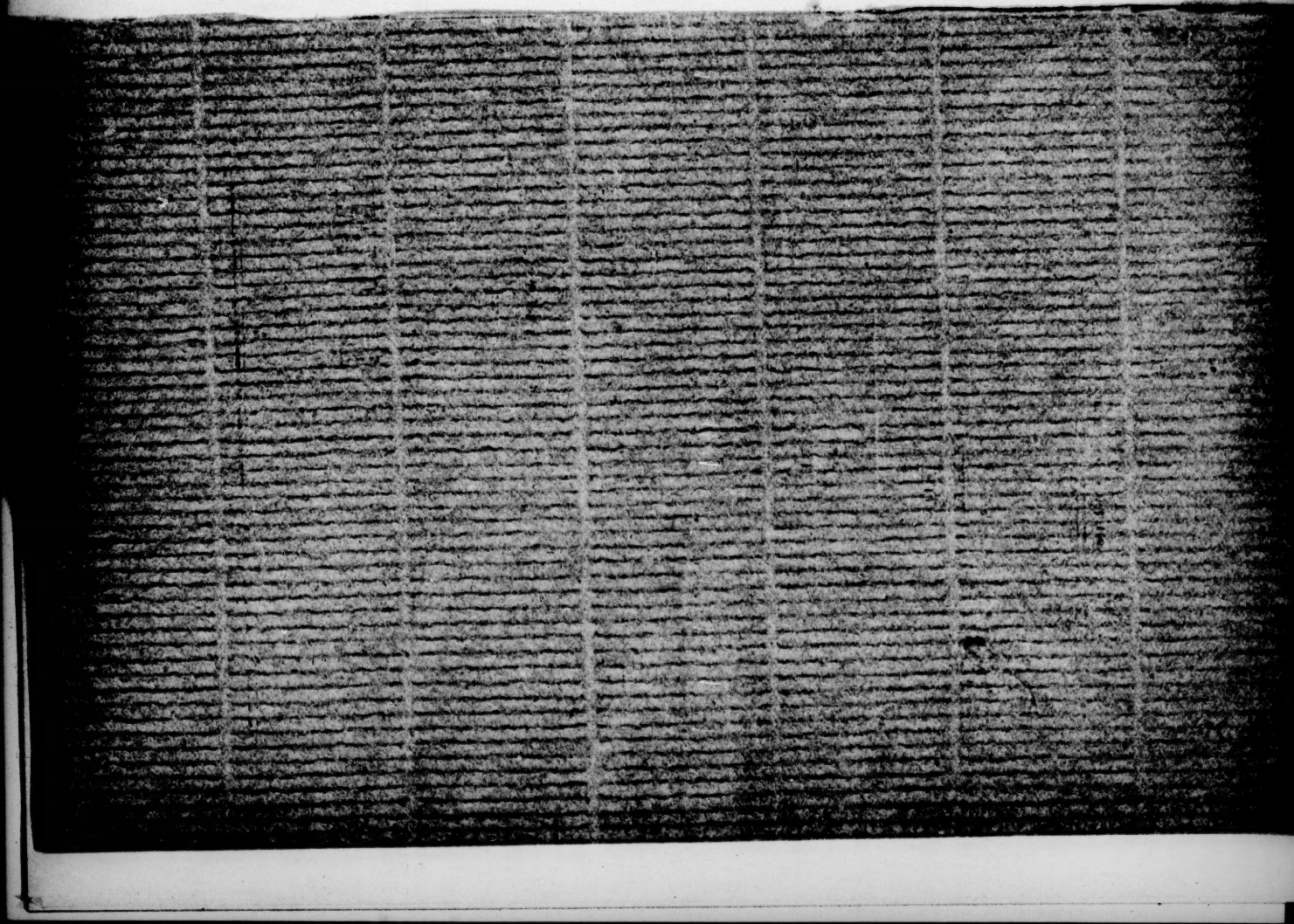
Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF OF J. D. ROUSE AND WILLIAM GRANT, IN BEHALF OF APPELLANT.

J. D. ROUSE,
WILLIAM GRANT,
Counsel for Appellant.

NEW ORLEANS, Nov. 15, 1886.

F. F. Hansell & Bro., Print. 28 & 30 Camp Street, N. O.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 1094.

EDWARD C. HANCOCK, APPELLANT,

versus

MRS. ELIZA JANE HOLBROOK ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF OF J. D. ROUSE AND WILLIAM GRANT, IN BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This suit was brought in the Superior District Court for the Parish of Orleans, in the State of Louisiana, November 25th, 1876. Nicholson, one of the defendants, on the 13th of December, 1876, filed in said Court a petition for the removal of the suit to the Circuit Court of the United States for the District of Louisiana, under the provisions of the act of March 3d, 1875, alleging that he was a citizen of Mississippi; and the plaintiff a citizen of Louisiana. (R. p. 13). A transcript of the record of the proceedings in the State Court was subsequently filed in said

Circuit Court, where the suit proceeded to a final decree, from which an appeal was taken to this Honorable Court. It was here adjudged that the record did not disclose such a case as to give jurisdiction to the Circuit Court on removal. For this reason the decree of the Circuit Court was reversed, and the cause returned to that Court with instructions to remand it to the State Court; (*Hancock vs. Holbrook et al.*, 112 U. S. R. 229, R. p. 15) which mandate was complied with by said Court March 4th, 1885. (p. 15.)

The bill presents a case where a single stockholder in a body corporate, holding a majority of its capital stock, and being president of its board of directors, applied the whole of the corporate property to the payment of his individual debt, and immediately repurchased the same, and continued in the possession which he had acquired as the head of the corporation, under a claim as sole owner. (R. p. 1 *et seq.*)

The plaintiff, a stockholder in the corporation so despoiled, seeks redress in this action, because, through the controlling power of the spoliator, and as a part of the scheme by which he so appropriated its property to himself, he dissolved the corporation, and made it impossible for the plaintiff to obtain redress through corporate action.

The suit was originally brought against Mrs. Holbrook, George Nicholson, R. W. Holbrook and Charles T. Howard. (p. 9, fol. 37). Richard Fitzgerald was afterwards made a defendant by amendment. (p. 14.)

R. W. Holbrook and Fitzgerald were liquidating commissioners of the despoiled corporation. (p. 5, fol. 14.) Mrs. Holbrook was in possession of the property, as universal legatee of A. M. Holbrook, deceased, who, the bill alleges, had appropriated it to his own use, in violation of his trust as president of the corporation. Nicholson claimed some interest derived from Mrs. Holbrook (p. 8, fol. 29), and Howard was supposed to claim some interest or lien upon the property. (p. 8, fol. 32.) His death

was afterwards suggested, and the suit discontinued as against him. (p. 20, fol. 53.)

The other defendants answered the petition. Mrs. Holbrook, having meanwhile married defendant, Nicholson, answered by that name. (p. 18.)

After issue joined, the plaintiff filed his petition for the removal of the suit to the Circuit Court of the United States, under the provisions of the act of Congress of March 2, 1867 (commonly called the "local prejudice act"), now the third paragraph of Sec. 639, R. S. In such petition, he averred himself to be a citizen of the State of New York, and the defendants to be citizens of the State of Louisiana; that the amount in dispute, exclusive of costs, exceeded the sum or value of five hundred dollars, and that he had reason to believe, and did believe, that from prejudice and local influence, he would not be able to obtain justice in said State Court. (p. 20.)

The petition was duly sworn to, and a proper bond therewith tendered and filed. (p. 21.)

The State Court refused to relinquish its jurisdiction over the case, upon the ground, that a proper showing for its removal had not been made. (p. 22.)

The plaintiff, however, filed a transcript of the proceedings had in the State Court, in said Circuit Court, and thereupon the defendants moved to remand the case to the State Court, whence removed, upon the grounds, first, "that it is not alleged, nor was "it true, that the plaintiff was a citizen of New York, or of any "other State than Louisiana, at the time of the institution of the "suit; second, that the defendants, George Nicholson, and his "wife, Eliza Jane Nicholson (late Mrs. Holbrook), were citizens "of the State of Mississippi at the time the petition for removal "was filed in the State Court." (p. 22.)

By agreement the motion was treated as a plea, and replied to by the plaintiff. (p. 23.) The plaintiff admits that Nicholson

and wife made *prima facie* proof of their citizenship, as alleged in said motion, and, therefore, the evidence was not brought up.

The Circuit Court sustained the motion and remanded the case to the State Court. (p. 24.)

The plaintiff appealed and

ASSIGNS AS ERROR,

the decree of the Circuit Court. remanding the case to the State Court.

ARGUMENT.

I.

A party may remove a case from a State Court to the Circuit Court of the United States, under the act of March 2d, 1867, if, at the time of his application, he be a citizen of another State than that in which the suit is brought, although he had not such citizenship when the suit was commenced.

The act of March 2, 1867 (third clause of Sec. 639, R. S.) furnished a new cause for removal of a suit from a State Court to the Courts of the United States.

In *Johnson vs. Monell*, 1 Woolworth, 390, Mr. Justice MILLER accurately stated the only conditions necessary to the exercise of the right of removal under this act, as follows:

"1. That the controversy shall be between a citizen of the "State in which the suit is brought and a citizen of another "State."

"2. That the matter in dispute shall exceed the sum of five "hundred dollars, exclusive of costs."

"3. That the party citizen of such other State shall file an "affidavit, stating that he believes and has reason to believe, "that, from prejudice or local influence, he will not be able to "obtain justice in the State Court."

"4. That he give the requisite surety for appearing in the "Federal Court at the proper time, with copies of the papers."

In that case, the suit was commenced in the District Court of the State of Nebraska, one of the defendants being a cititzen of that State, and the other defendant a citizen of the State of New York. The plaintiff during the pendency of the suit voluntarily removed to and became a citizen of Iowa, and thereafter transferred the case to the proper Federal Court under the provisions of the Act of March 2, 1867. Considering these facts, upon motion to remand, Mr. Justice MILLER said:

"The act does not in terms prescribe the time at which the "citizenship of the moving party must be acquired. Nor is "there anything from which to imply that a time was intended "to be limited in that regard. Had Congress intended to confine "the privileges of the act to parties who were citizens of different "States at the commencement of the suit, it would have been "very easy so to have provided. It did not see fit to do so. On "the other hand, in express terms, or at least by the strongest "implication, it provided otherwise. The language is, 'When a "suit is now pending or may hereafter be brought, in any such "Court in which there is a controversy between a citizen,' etc., "which is as much as to say, whenever a controversy shall arise "in a suit pending in a State Court, the parties to which shall at "any time be citizens of other States, the cause may be removed. "No time at which the citizenship shall be acquired is limited. "So the inference is that it may be acquired at any time."

And it was held that the plaintiff's voluntary change of citizenship *pendente lite*, in order to be able to remove his cause, did not affect his legal right to such removal.

In *Miller vs. Chicago B. & Q. R. Co.*, 17 Fed. Rep. 97, Mr. Justice MILLER, at the request of Judge McCrary, also gave his opinion upon this question, in which he said:

"It is to be observed that the *main ground* of removal under

the act of 1867, embodied in this clause of the Revision (third of Sec. 639, R. S.) is the existence of prejudice or local influence. Removal, when citizenship alone was the cause, has been provided for by other statutes, and is found in other sections of the Revision. But since removal for prejudice could not constitutionally be made without the required citizenship, it was necessary to incorporate into this statute so much on that point as to make the statute constitutional. It is not necessary in that view that the citizenship should have existed when the suit was brought. It is fair to presume that Congress meant to say that whenever the requisite citizenship co-exists with such prejudice or local influence as will prevent a fair trial in the State Court, the party liable to be injured by that prejudice—namely, the one who is a citizen of another State—may have the cause removed. * * * * In the case before you, citizenship is a necessary incident to removal, but is not the principal ground on which the right is founded, and there exists no language in the statute which implies a limitation of the right to citizenship in different States, existing when the suit was brought. Nor does the reason apply, for surely it is right that, when prejudice or local influence will prevent a fair trial, a change of venue should be had; and if *then* the parties have the requisite citizenship, no reason is perceived why the change should not be to a Federal Court. No provision of the statute, nor any sound policy of law, forbids such a transfer of the case."

This view of the act was taken by Mr. Justice Woods, in *Jackson vs. Life Ins. Co.*, 3 Woods' R. 413; by Judge Dillon, in *McGinnity vs. White*, 3 Dillon's R. 351, and was followed in *Cook vs. Whitney*, 3 Wood's R. 715.

In *Hess vs. Reynolds*, 113 U. S. 80, speaking of this local prejudice clause, this Court said:

"We are of opinion that this clause of section 639 remains, "and is complete in itself, furnishing its own peculiar cause of

" removal and prescribing, for reasons appropriate to it, the time " within which it must be done. One of these reasons is, that " the prejudice may not exist at the beginning, or the hostile " local influence may not become known or developed at an " earlier stage of the proceedings. Congress, therefore, intended " to provide against this local hostility, whenever it existed up to " the time of the trial."

This Court also, in *Yulee vs. Vose*, 99 U. S. R. 546, construed the removal act of July 27, 1866, to " give the party to whom this " new privilege was granted, an opportunity of availing himself " of any circumstances that may appear in his favor, previous to " the time when he is called upon to act."

The removal acts, prior to the Act of March 2, 1867, made the right to remove dependent wholly upon the citizenship or alienage of the parties. The act of 1867 made the existence of prejudice or local hostility the cause for removal. The act was due to the enmities existing between the people of different States, growing out of the late war; (*Gaines vs. Fuentes*, 92 U. S. 19) and the manifest intent of Congress was to provide an impartial tribunal in all such cases where it could constitutionally do so. Citizenship was an incident, only because necessary to the jurisdiction after removal. The right was conferred in all pending cases, the language being, " That where a suit *is* now pending * * * * " in which there *is* a controversy," etc. The right was not, in pending suits, confined to those whose citizenship might have enabled them to bring their suit originally in the Federal Court or to remove it thereto under prior acts. If it had been, the act would have failed in a great degree of its remedial purpose. And if, as to suits pending at its passage, the existing citizenship of the parties, coupled with local prejudice, made a case for removal, why should any different rule be applied to cases thereafter brought?

II.

The plaintiff, who sought the removal, being a citizen of New York, and two of the defendants, being citizens of Louisiana, the fact that other defendants were citizens of Mississippi, did not deprive him of the right.

When the defendant applied for the removal of his suit, the controversy therein was "between citizens of different States," and, as an original suit, would have been within the jurisdiction of Circuit Court. There was then no constitutional obstacle to its removal thereto.

The Court below put its decision, remanding the case, upon the ground that some of the defendants were not citizens of Louisiana, the State in which the suit was brought, and relied upon the *Case of the Sewing Machine Companies*, 18 Wall. 553, as authority for its action.

We confess, that we are unable to find in that case, any support for the theory of the lower court. In that case, the plaintiff and one of the defendants were citizens of the State in which the suit was brought. Application for removal, under the local prejudice act, was made by defendants, citizens of *other* States, which was denied. This Court there said:

"Either the non-resident plaintiff, or non-resident de-
" fendant, may remove the cause under the last named act (March
" 2, 1867); provided, all the plaintiffs or all the defendants join in
" the petition, and all the *parties petitioning* are non-residents, as
" required under the Judiciary Act; but it is a great mistake to
" suppose, that any such right is conferred by that act, where one
" or more of the plaintiffs, or one or more of the *petitioning*
" defendants, are citizens of the State in which the suit is pend-
" ing, as the act is destitute of any language which can be properly
" construed to confer any such right, unless all the plaintiffs or

" all the defendants are non-residents and join in the petition." (p. 587.)

The plaintiff is within the rule prescribed. He is a non-resident and sole plaintiff, and none of the defendants are citizens of the same State with him. No constitutional objection arises and there is no attempt by one person to divest a jurisdiction with which others joined with him are satisfied. There is a controversy between him and two citizens of the State where the suit was brought. The local hostility of which the plaintiff complains may be wholly due to their influence. There is nothing in the law, or in reason, which should prevent him from transferring his suit to an impartial tribunal, because there are defendants who are not citizens of such State.

The purpose of the act undoubtedly was to give the right of removal for the cause stated, in all cases when the citizenship of the parties was such that the Circuit Court could take jurisdiction. (*Sands vs. Smith*, 1 Dillon. Rep. 290; *Ackerly vs. Vilas*, 2 Biss. 110, affirmed by Mr. Justice DAVIS, note p. 115.) The case of *Myers vs. Swan*, 107 U. S. 546, inferentially sustains this view, although the precise point was not, in terms, decided. So also does *Johnson vs. Monell, supra*, where one of the defendants was a citizen of New York.

But the Act of March 3, 1875, materially enlarged the right of removal, and, "If, then," says Mr. Justice MILLER, "the generality " of the langauge of the act of 1867 was limited by the con- " struction given to the act of 1789, and subsequent statutes, " such limitation ought to cease after the act of 1875, which " gives the more enlarged right, which is in exact conformity to " the act of 1867." (*Burnham vs. Chicago, etc. R. R. Co.*, 4 Dill. 507.

This view of the case is strengthened by consideration of Section five of the act of March 3, 1875, which provides: " That if " in *any suit*, * * * removed from a State Court to a

" Circuit Court of the United States, it shall appear * * *
" * that such suit does not really and substantially involve a
" dispute or controversy properly *within the jurisdiction* of said
" Circuit Court, * * * said Circuit Court shall proceed
" no further therein, but shall * * * remand it to the
" court from which it was removed," etc.

This section applies to all cases removed to the Circuit Court, whether under the act of 1875, or prior acts. As already shown, the plaintiff's case is *within the jurisdiction* of the Circuit Court, and in the class of cases removable under section two of said act, and the cause for removal—local prejudice—authorized its removal without regard to the limitation, as to time, under said act.

The decree of the Court below should be reversed, and the cause remanded with directions to said Court to proceed therewith according to law.

Respectfully submitted,

J. D. ROUSE,
WILLIAM GRANT,
Counsel for Appellant.

NEW ORLEANS, Nov. 15, 1886.

19-586

REPLY TO DEFENDANTS' BRIEF.

R. W. Holbrook and Richard Fitzgerald are sued as the liquidators of the defunct corporation, the New Orleans Picayune Printing Company. Counsel for appellees say in their brief (p. 4), that plaintiff "Considered that the liquidators had no interest "in the controversy, because they had not assumed the office or "function of liquidator, and therefore dismissed them from the "suit by an amended and supplemental petition, filed 9th April, "1885."

This is an error. While the amended petition did aver that said liquidators did not qualify or assume to act as such, it prayed that they be enjoined from dealing with the property of the corporation. (R. pp. 16, 17.)

Defendants excepted to this amended petition (p. 17), and it was dismissed in the State Court *before* removal. (Supplement, Transcript.) The defendants, including said liquidators, afterwards answered, denying all plaintiff's allegations (p. 18), and subsequently filed an amended answer and demand in reconvention (p. 18.)

The issues were joined in the State Court upon plaintiff's original petition; and these issues are all that were transferred to the Circuit Court. The case there stands as if the amended petition had never been filed.

Plaintiff could not dismiss the liquidators and maintain his suit; they are necessary parties to the relief he seeks. They are the sole representatives of the dissolved corporation. If it were not dissolved, the corporation would be a necessary party. *Davenport vs. Dows*, 18 Wall. 626; *Kendig vs. Dean*, 97 U. S. 423.

Respectfully submitted,

J. D. ROUSE,

WILLIAM GRANT,

Counsel for Appellant.

DECEMBER 1st, 1886.

119-586

Supreme Court of the United States.

EDWARD C. HANCOCK, APPELLANT,

vs.

MRS. ELIZA JANE HOLBROOK, GEORGE NICHOLSON, R. W. HOLBROOK AND RICHARD FITZGERALD.

No. 1094.

October Term, 1886.

THOS. J. SEMMES,
ROB'T. MOTT,
of Counsel for Appellees.

Supreme Court of the United States.

EDWARD C. HANCOCK, APPELLANT,

vs.

MRS. ELIZA JANE HOLBROOK, GEORGE NICHOLSON, R. W. HOLBROOK AND RICHARD FITZGERALD.

No. 1094.

October Term, 1886.

This case has been pending ten years. At the time Hancock brought his suit against A. M. Holbrook and others, all parties were citizens of the State of Louisiana.

A. M. Holbrook died while the suit was pending in the State court; his wife succeeded to his rights as universal legatee; she transferred an interest in the litigated property to Nicholson who was a citizen of Mississippi; he filed a petition for the removal of the suit to the Federal court; the removal took place; while the suit was pending in the Federal court, Mrs. Holbrook married Nicholson; a decree was rendered in their favor; on appeal, this decree was reversed, and the cause remanded to the State court, because it had been erroneously removed. 112 U. S. 230.

The Court, having reason to believe that the removal had been effected by consent, directed that each party pay one-half the costs in this Court and gave leave to the Circuit court to make such order as to costs accrued in that court after removal, as justice and equity might require.

Thereupon the Circuit court, in remanding the cause to the State court, ordered the costs, which had accrued in that court after removal, to be divided between the parties, inasmuch as the removal had been effected by consent. P. 15.

In this state of the case, and after the suit had been remanded, and after Hancock had filed a supplemental petition in the State court, and after the defendants had joined issue and filed a claim in reconvention, and after the plaintiff had discontinued his suit against Howard, he filed a petition for the removal of the cause to the Circuit court under the local prejudice act of 1867, alleging that he then was a citizen of the State of New York.

The supplemental petition of plaintiff was filed in

the State court, 9 April, 1885.—P. 16. The answer of defendants was filed 13 June, 1885; the claim in reconvention was filed 21 October, 1885; the motion to dismiss Howard from the suit, and the petition for removal were filed December 8, 1885.—P. 20.

The State court refused to order the removal. Nevertheless Hancock filed a transcript of the proceedings of the State court in the Circuit court; whereupon the defendants moved to remand the case to the State court, on the grounds

1.—That the plaintiff was not a citizen of New York at the time of suit brought:

2.—That Nicholson and his wife were citizens of Mississippi at the time the petition for removal was filed.

An examination of the case stated in the bill shows that the real parties in interest are defendants, Nicholson and wife, and the plaintiff Hancock; the defendants, R. W. Holbrook and Fitzgerald, who are citizens of Louisiana, are nominal parties and do not pretend to claim any interest in the property involved in the suit. The claim in reconvention was based on the apprehension that Hancock would institute a new suit in the Federal court for the same cause of action, and it sought to enjoin him from so doing, because the new suit in the Federal court could not be defeated by a plea of *lis pendens*, and the plaintiff would thus be subjected to two suits for the same thing, inasmuch as the suit in the State court was not removable. P. 19.

R. W. Holbrook was made a party to the original suit, filed 25th November, 1876; Fitzgerald was made a party by supplemental petition, filed 19

December, 1876. P. 14. They were so made parties, because they were supposed to be liquidators of the dissolved corporation; but as the property of the corporation had been sold and then transferred to Holbrook, the plaintiff who went for the property in the hands of Holbrook and his heirs, considered that the liquidators had no interest in the controversy, because they had not assumed the office or function of liquidator, and therefore dismissed them from the suit by an amended and supplemental petition, filed 9th April, 1885, wherein he says "that said R. W. Holbrook and Richard Fitzgerald did not nor did either of them *qualify or assume* to act as liquidators of said New Orleans Picayune Printing Company, *and are without interest in the premises*" P. 16.

If they have no interest, as is confessed by the plaintiff, there is, in this suit, no controversy between him and the two defendants named.

The only controversy in the suit is the one between the plaintiff and Mr. and Mrs. Nicholson who are citizens of the State of Mississippi; as to them, the suit is not removable under the Act of 1867, because Mr. and Mrs. Nicholson are not citizens of the State in which the suit is brought.

If Fitzgerald and R. W. Holbrook be nominal parties, their citizenship cannot confer jurisdiction.

Wood vs. Davis, 18 How. 469.

Bacon vs. Rives, 106 U. S 101.

The right of removal depends on the case disclosed by the pleadings when the petition therefor is filed.

Hunter vs. Kernochan, 103 U. S. 563.

2.—Even if Fitzgerald and R. W. Holbrook are to be regarded as parties in interest, the suit is not removable because *all* the defendants are not citizens of Louisiana, the State in which the suit is brought

Sewing Machine Co., 18 Wall, 553.

George vs. Pilcher, 28 Gratt, 303.

It is not pretended that the suit was removable under the act of 1875, because at the commencement of the suit the plaintiff was a citizen of Louisiana; besides issue was joined 13 June, 1885; the case could have been tried at that term; the petition for removal was filed at the ensuing term, which commenced on the first Monday of November, 1885.

3. If the suit was not removable when it was commenced, no subsequent change of citizenship would authorize a removal under the act of 1867, for the reason given by the Supreme court of Massachusetts in Tapley vs Martin, 116 Mass. 275.

There is good policy in allowing the plaintiff or defendant, at any time *before* trial to remove his case from a court *foreign to him* when the suit was commenced.

We see no sound reason for according such a privilege to a citizen of the State where the suit is brought, and against whom no possible prejudice within the contemplation of the act of 1867 could exist. His change of residence after the commencement of the suit, for the purpose of defeating the jurisdiction of the State court, ought not to be countenanced.

In both of the cases, reported in 3 Woods, cited

by the counsel for appellant, the decision was that the petition for removal need not aver citizenship in a State other than that where the cause is pending at the time the suit was commenced; that was the construction given in those cases to the act of 1875 as well as to the act of 1867. This court has ruled otherwise as to the act of 1875. In those cases it does not appear that the party seeking removal had removed from the State after suit brought.

At the commencement of this suit, the Circuit court had no jurisdiction; this court has so decided. The principle is almost universal, that when the jurisdiction of a court once attaches it cannot be divested by subsequent events. The jurisdiction of the State court was exclusive when the suit commenced, because the case was not removable to the Federal court; shall a change of citizenship, *pendente lite*, deprive the State court of its legitimate power? If the case at its commencement was susceptible of removal under the Constitution, then Congress might regulate the time within which and the circumstances under which a removal might be made.

But in this case a suit is instituted in a State court between citizens of the State, over which suit Congress has no control; the suit proceeds to trial, but before the trial is concluded, the plaintiff or defendant changes his residence to another State, and then, by a removal of the suit to the Federal court, attempts to annul all proceedings in the State court which, up to that time, had exclusive jurisdiction of the cause; and until the alleged change of resi-

dence, the parties and the suit were beyond Federal judicial authority.

As no change of residence or condition of parties can take away the jurisdiction of the Federal court after it has once attached, the same principle is applicable to the State courts, and should be enforced, unless the language of the Act of Congress is so clear as to leave the court no room for construction.

Morgan vs. Morgan, 2 Wheat, 290:

Mellon vs. Torrance, 9 Wheat, 537:

Dunn vs. Clarke, 8 Pet. 1:

Clarke vs. Matthewson, 12 Pet. 164.

We subjoin a copy of the opinion of the Circuit Judge delivered in this case.

Respectfully submitted,

THOS. J. SEMMES,

ROB'T. MOTT,

of Counsel for Appellees.

OPINION OF JUDGE BILLINGS ON MOTION TO REMAND; FILED 15TH MARCH, 1886.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF LOUISIANA.

EDWARD C. HANCOCK

VS.

MRS. ELIZA JANE HOLBROOK ET AL.

No. 11,215.

This cause is submitted on a motion to remand to the State court.

In the year 1876, plaintiff, describing himself as a citizen of the State of Louisiana, commenced this action in the State court. The cause was apparently by consent brought to the Circuit court, here tried, appealed to the Supreme Court which held that the jurisdiction of the Circuit Court did not appear in the record, and directed the Circuit Court to remand the cause. This was done.

Subsequently to the cause having been remanded to the State Court, to-wit: on the 8th day of December, 1885, the plaintiff filed a petition for removal of the cause to the Circuit Court, verified by his affidavit and accompanied by the proper bond.

The affidavit is to effect that the plaintiff was, at the time of making the same, a citizen of New York, and the four defendants (the suit having been discontinued as to the fifth defendant) were citizens of the State of Louisiana. The State Court

refused the transfer. But an authenticated copy of the Record has been filed in this Court. The issue has been presented by two of the defendants, namely, Mrs. George Nicholson (formerly Mrs. Eliza Jane Holbrook) and George Nicholson, that they were, at the time this last petition for removal was presented to the State Court, citizens of the State of Mississippi.

The application for removal was made under the Act of 1867, called the local prejudice act.

The affidavit of the plaintiff that he had become and was at the time of filing his last petition for removal, a citizen of the State of New York, is uncontradicted.

Mr. and Mrs. Nicholson have offered the testimony and affidavits of numerous witnesses, and have abundantly established that they were, at the time of the filing of the plaintiff's last petition for removal, citizens of Mississippi.

The first proposition contended for by the counsel for the plaintiff is, that under the Act of 1867, the citizenship of the parties at the time of the application for removal and not at the time of the commencement of the suit is to be looked at.

In Insurance Co. vs. Pechner, 95 U. S. R., page 185, the Court resolve this question and note that the language of the Act of 1867 bearing upon this question is different from that of 1875. But the Court need not decide this question in this cause. If it be assumed without any passing upon this point, that the law is as it is claimed by the plaintiff's counsel, we then have a cause pending in the State of Louisiana against four defendants, wherein the

plaintiff is a citizen of New York, two defendants are citizens of the State of Mississippi, and two defendants are citizens of the State of Louisiana. The nature of this cause has been passed upon by the Supreme Court in Hancock vs. Holbrook, 112 U. S. R., page 231, where the Court say: "there is no pretense of a separable controversy."

It is to be observed that the suit is between a citizen of New York, two citizens of Mississippi, and two citizens of Louisiana, brought in the latter State. It is contended by the learned counsel for the plaintiff, that the fact that the controversy is altogether between citizens of different States and that the plaintiff is a citizen of another State, and two defendants are citizens of the State where the action is brought, authorized the removal, notwithstanding the fact that two of the defendants are non-resident citizens.

When a removal is sought under the Act of 1867, more than one person are joined as plaintiffs or defendants, and where, as here, the Supreme Court has determined the cause of action is not divisible, the test of citizenship must apply to each party to the suit collectively. Florence Sewing Machine Co. vs. Grover & Baker Sewing Machine, 110 Mass., p. 70.

In this case after it reached the Supreme Court of the United States, it was held, 18 Wall, p. 553: "A case in which the plaintiff is a citizen of the State where the suit is brought, and two of the defendants are citizens of other States, a third defendant being a citizen of the same State as the plaintiff, is not removable under the Act of 1867

upon the petition of the two foreign defendants. The Court say, at page 583: "When plaintiff and defendant are both non-residents, the acts of Congress make no provision for removal."

In Knapp vs. R. R. Co., 20 Wall, 117; the court holds that the Act of 1867 does not change the settled rule, that determines who are to be regarded as the plaintiff and defeudant, i. e., that the plaintiffs or defendants must be *collectively* such as to authorize the removal.

The case of Johnsen vs. Morell, 1 Woodworth, 391, might have led to a decision of this point, but did not.

The reasoning in Sands vs. Smith, 1 Dillon, 290, is in favor of a doctrine contrary to that which the Supreme Court have established.

The same may be said of Akerly vs. Vilos, 1 Bissell, 110. But as the Supreme Court in the 18th and 20th Wall, cited above, have settled the question that the party plaintiff or defendant, when consisting of more than one must *collectively* be so situated as to authorize a removal, this Court must follow that construction. The case of Meyers vs. Swann, 107 U. S. R., page 546, has not overruled these cases.

The removal Act of 1867 is a more extensive act as to the time when it may be put in operation, than many of the other Removal Acts, in that it may be invoked at any time before trial. It requires the Court in order to transfer the cause to inquire into no part beyond the belief or fear, on the part of the plaintiff or defendant seeking the removal, that on account of local prejudice he cannot obtain

justice in his cause in the local tribunals. This might wisely be permitted, if the local tribunals were of the locality of the adverse party. But it seems to me that the intention of Congress was that the locality, the citizenship, of the party adverse to that of him seeking the removal should be in the State where the local prejudice is averred to exist. The fact that enough exists to give the Circuit Court jurisdiction under the general statutes, viz: citizenship of different States is not enough under this local prejudice act. In this case Mr. and Mrs. Nicholson are citizens of Mississippi, and the cause is pending in Louisiana.

They are the chief defendants.

Let the cause be remanded.

19-586

Supreme Court of the United States.

October Term, 1886.

No. 1094.

ADDITIONAL BRIEF OF APPELLEES, FILED IN CASE THE AMENDED TRANSCRIPT, AND THE REPLY OF APPELLANTS TO DEFENDANTS' BRIEF BE PERMITTED.

ROB'T. MOTT,
THOS. J SEMMES,
of Counsel for Appellees.

Supreme Court of the United States.

October Term, 1886.

No. 1094.

Additional Brief of Appellees, Filed in Case the Amended Transcript, and the Reply of Appellants to Defendants' Brief Be Permitted.

The appellant made his own record (see certificate of clerk) and cannot complain that it is imperfect. The amended and supplemental petition, p. 16, says "That said R. W. Holbrook and Richard Fitzgerald did not, nor did either of them qualify or assume to act as liquidators of the New Orleans Picayune Printing Company, and are without interest in the premises."

This is a substantive averment made by the plaintiff in the record, and whether that particular

pleading be maintained or not is not material, as it is a judicial admission of a fact made by the plaintiff, and by the rules of pleading in the Courts of Louisiana, as well as in the courts of the United States, the decision of an exception or a demurrer is not a final judgment from which an appeal will lie; and when an exception or demurrer is maintained, the question remains to be taken up and decided on the appeal or writ of error from the final decree or judgment by the appellate court; the party against whom such decision has been rendered, is in the position of contending that such decision is erroneous, and must ask its reversal in the court of last resort, where it can only can be considered and finally settled: Giordan vs. Thomas, 13 La. 315.

The appellant is therefore still, in the understanding of the law, contending for the right to maintain and have the benefit of the allegations of his amended and supplemental petition, filed April 9th, 1885, and the removal of the cause does not deprive him of the right to have it considered.

But should this not be the case, there is not in the original petition, nor in the amended petition, filed December 19th, 1876, p. 14, any averment that the defendants, R. W. Holbrook and R. Fitzgerald, had any interest in the property in dispute, or that they ever had any interest therein; nor is any process other than notification of the institution of the suit by citation, prayed against them; the aver-

ments are all to the effect, and to the fact, that Nicholson and wife and Charles T. Howard were in possession of the property; the Nicholsons claim to be sole owners and Howard pledgee, and process of injunction is alone prayed against them to restrain their disposition of the property during the pendency of the suit, they being the only owners and possessors of the property.

Nor is it anywhere pretended that R. W. Holbrook or R. Fitzgerald had any interest in the property, or that they ever possessed the same. Nor was it possible for them under the facts set forth in the petition, viz: that the property of the defendant corporation, the Printing Company, had been sold and was in their possession, having been delivered to the other defendants, for the said Holbrook and Fitzgerald, who had never acted as Commissioners, to claim the same, and after all these years of concurrence on their part in the title of the present possessors, to set up claim to liquidate the affairs of the corporation.

There is not now, and there never has been, a controversy between the commissioners appointed to liquidate the affairs of the corporation and the plaintiff, and so far as they are concerned, there is nothing to remove into the Federal court; no judgment can be rendered against them that can be executed, and this is shown by the fact that none is asked against them; they do not represent the corporation,